STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 17, 2009
v	No. 281385 Oakland Circuit Court
MICKEY ALLEN HICKS, Defendant-Appellant.	LC No. 2007-213264-FH

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Defendant was convicted of unarmed robbery, MCL 750.530. He was sentenced, as a fourth habitual offender, MCL 769.12, to 142 to 360 months in prison for his conviction. He appeals as of right. We affirm.

Defendant first argues that the evidence presented at trial was insufficient to support his conviction. We disagree. We review sufficiency of the evidence claims de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), viewing the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt, *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

MCL 750.530(1) states, "[a] person who, in the course of committing a larceny[1] of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony . . . ." The elements of unarmed robbery are: "(1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed." *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). The elements of larceny are: (1) actual or constructive taking of goods or property, (2) carrying away or asportation, (3) felonious intent, (4) the property belongs to another, and (5) the taking is without the consent, and against the will, of the owner. *People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992).

[1] "'[I]n the course of committing a larceny' includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." MCL 750.530(2); *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

As pointed out by defendant, the victim's trial testimony, 911 call, statement to Officer Thomas Marciniak shortly after the incident, and statement to Officer Robert White days after the incident, all differ slightly regarding the details of defendant's assault upon the victim. For example, the victim testified that defendant kicked him in the face four times, told the 911 operator that defendant kicked him in the face six times, told White that defendant only kicked him once, subsequently punching him in the face once he was on the ground, and never said a thing to Marciniak about being kicked in the face, but rather, only mentioned being punched in the face. The victim's testimony, and respective statements to the 911 operator and White, also differ slightly from his statement to Marciniak regarding how defendant went about taking his property, testifying that he felt defendant reach into his pocket and grab his wallet, which is consistent with his statement to White and the 911 operator, but inconsistent with his statement to Marciniak that defendant grabbed the victim's wallet off the table.

However, regardless of the inconsistencies between the victim's testimony and his respective statements to the 911 operator, White, and Marciniak, the victim's testimony clearly establishes that an unarmed defendant assaulted the victim (either by kicking or punching the victim in the face), prior to taking the victim's property without his permission (either by taking the victim's wallet directly from his person and subsequently removing items, or by taking the victim's wallet off the table and subsequently removing items). Viewing the evidence presented in a light most favorable to the prosecution, it therefore follows that sufficient evidence was presented to support defendant's unarmed robbery conviction. See MCL 750.350; *Johnson, supra* at 125-126; *Ainsworth*, *supra* at 324. Furthermore, even though the only evidence presented to establish that defendant committed unarmed robbery is either the victim's testimony itself, or testimony based on the victim's statements, and defendant alleges that given the aforementioned inconsistencies, the victim is not credible, this Court must afford deference to the jury's special opportunity and ability to determine the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

Defendant next argues that the sentence imposed upon him constitutes cruel and unusual punishment. We disagree. Given that defendant failed to properly preserve this issue for appeal by objecting to his sentence as being disproportionate or cruel and unusual, or by raising this issue in a timely motion for resentencing or in a motion to remand filed with this Court, *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003), we review this issue for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763, 773; 597 NW2d 130 (1999).

Here, it is undisputed that defendant's minimum sentence is within the properly calculated guidelines range. Therefore, defendant's minimum sentence is presumptively proportionate and does not constitute cruel or unusual punishment. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004); *McLaughlin, supra* at 669-671. It follows that the trial court did not commit plain error when it failed to sua sponte strike defendant's sentence.

Defendant next argues that the trial court erred when it denied his motion for a mistrial. We disagree. We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

A mistrial should be granted only because of an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App

194, 205; 659 NW2d 667 (2003). Defendant argues that a mistrial should have been granted because he was prejudiced by the victim's violation of the trial court's sequestration order. The purposes of sequestering a witness are to prevent him from coloring his testimony to conform to the testimony of another and to aid in detecting testimony that is less than candid. *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008). To remedy a violation of a sequestration order, a court may hold the offending witness in contempt, permit cross-examination concerning the violation, or preclude the witness from testifying. *Id*. Exclusion of a witness' testimony is an extreme remedy that should be sparingly used. *Id*. The inadvertent nature of a violation, the existence of a bench trial, and the fact that a violation only resulted in hearing opening statements (not testimony) are mitigating factors that weigh against the extreme remedy of precluding the witness from testifying. *Id*. at 654-655. This Court reviews a trial court's decision regarding what remedy to impose, if any, for an abuse of discretion. *Id*.

Although defendant did not have a bench trial, as was the case in *Meconi*, *supra*, no evidence has been presented that suggests that the victim's violation of the sequestration order was purposeful and, furthermore, it is undisputed that the victim only heard short opening statements, not testimony. Moreover, the nature of the trial court's sequestration order in this instance was merely to prevent witnesses from discussing their testimony with other witnesses. Given the circumstances, we conclude that the trial court would not have been justified in precluding the victim from testifying, and thus, the trial court did not abuse its discretion when it chose, as the sole remedy, to allow defense counsel to cross-examine the victim regarding his violation of the court's sequestration order. See *Meconi*, *supra* at 654-655. It follows that the trial court likewise did not abuse its discretion when it denied defendant's motion for a mistrial based on its finding that defendant would not be prejudiced by the fact that the victim heard defense counsel's opening statement and was still going to be allowed to testify. See *Alter*, *supra* at 205.

Defendant next argues that the trial court erred when it instructed the jury on aiding and abetting. Since defendant expressed his satisfaction with the jury instructions, we conclude that defendant has waived this issue. See *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003).

Defendant's final argument on appeal is that he was denied his constitutional right to the effective assistance of counsel. Once again, we disagree. When reviewing a claim of ineffective assistance of counsel when an evidentiary hearing is not previously held, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). As a matter of constitutional law, we review the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id*. at 302. Decisions regarding what evidence to present and whether to call or question witnesses, as well as how to cross-examine and impeach a witness, are presumed to be matters of trial strategy, which a court will not review with the benefit of hindsight. *People v*

Dixon, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). The failure to present additional evidence only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *Dixon*, *supra*; *McFadden*, *supra*.

We reject defendant's argument that he was denied his constitutional right to the effective assistance of counsel as a result of defense counsel's failure to present certain witnesses. Defendant has failed to present affidavits or offers of proof regarding what his proposed witnesses would have testified to, and thus, the witnesses' alleged prospective testimony is not of record. It is therefore impossible for defendant to establish that a reasonable probability exists that, if defense counsel would have called the proposed witnesses, the outcome of the proceedings would have been different. Accordingly, defendant's argument in this regard fails. See *Toma*, *supra* at 302-303; *People v Davis*, 250 Mich App 357, 369; 649 NW2d 94 (2002) (holding that a defendant's ineffective assistance of counsel claim, which was based on his trial counsel's failure to call the defendant's proposed witnesses, failed when the defendant did not present affidavits regarding what his proposed witnesses would have testified to).

We likewise reject defendant's argument that he was denied his constitutional right to the effective assistance of counsel because defense counsel failed to adequately cross-examine the victim. The record establishes that during defense counsel's cross-examination of the victim, he attempted to impeach the victim's credibility by demonstrating that he was an alcoholic with an unreliable memory, that his testimony was inconsistent with his statements to the police, that he adjusted his testimony after hearing defense counsel's opening statement, and that given that he was not severely injured by defendant's assault upon him, he must have exaggerated the extent of his prior injuries. The record therefore reflects that defense counsel's cross-examination of the victim did not fall below an objective standard of reasonableness. Furthermore, defendant has failed to establish what additional questions defense counsel should have asked the victim during cross-examination and how such questions would have affected the outcome of the proceedings. Accordingly, defendant's argument in this regard fails. See *Toma*, *supra* at 302-303; *Dixon*, *supra* at 398.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray